

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

JUN 4 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Cable Act)
Reform Provisions of the)
Telecommunications Act)
of 1996)

CS Docket No. 96-85

DOCKET FILE COPY ORIGINAL

COMMENTS OF SBC COMMUNICATIONS INC. AND
SOUTHWESTERN BELL VIDEO SERVICES, INC.

SBC Communications Inc. and Southwestern Bell Video Services, Inc. (together "SBC"), respectfully submit these comments in response to the Commission's *Notice of Proposed Rulemaking* (FCC 96-85), released April 9, 1996 ("NPRM"). SBC supports the Commission's express intention in issuing this NPRM "to bring certainty to cable operators and local regulators, and to achieve as quickly as possible the deregulation intended by Congress."¹

DISCUSSION

I. THE COMMISSION SHOULD NOT ADOPT A SPECIFIC PASS OR
PENETRATION RATE FOR THE NEW "EFFECTIVE COMPETITION" TEST

Section 301(b)(3) of the Telecommunications Act of 1996 (the "1996 Act")² added a fourth prong to the statutory test for

¹NPRM ¶ 2.

²Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, enacted February 8, 1996.

determining effective competition, finding that effective competition exists if a local exchange carrier ("LEC") or its affiliate "offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator...."³

The Congressional goal in adopting this amendment was to expand the effective competition test for deregulating both basic and cable programming service tiers.⁴ As Commissioner Quello noted in his Separate Statement, this fourth prong of the effective competition test is "one of the more important and straight forward provisions" of the Telecommunications Act.

The three existing effective competition test categories in Section 623(1)(1) of the Communications Act of 1934, as amended, were not altered by the 1996 Act. However, unlike the other three effective competition tests, the new test does not impose a percentage pass or penetration rate guideline. The new statutory language is clear and unambiguous.

³Communications Act of 1934, 47 U.S.C. Section 623(1)(1)(D) as amended.

⁴Conference Report at 170.

Nevertheless, the Commission seeks comment as to how much of the cable operator's franchise area must be served by the LEC to constitute effective competition.⁵ SBC urges the Commission not to adopt rules imposing any specific penetration or pass rate for this new effective competition test. SBC believes that Congress omitted a specific penetration or pass rate requirement intentionally. Faced with the numeric precedent set by the three existing options, Congress clearly did not intend the same result with respect to the LEC's (or its affiliates) entry to the market. There is absolutely nothing in the 1996 Act or the legislative history that would lead to a different conclusion. SBC submits that the Commission should take this opportunity to forego unnecessary regulation and rely on the marketplace and competition to achieve the goals intended by Congress in the 1996 Act.

Additionally, the Commission tentatively concludes that the Title I definition of "affiliate" should be adopted for purposes of the new effective competition test.⁶ If the Commission ultimately adopts this standard, SBC contends that the affiliation standard must be met by a single LEC and not with an aggregation of LEC interests. SBC further contends that a

⁵NPRM ¶ 72.

⁶NPRM ¶ 77.

"beneficial interest," as that term is commonly understood, does not constitute ownership, and thus it cannot be considered the equivalent of an equity interest under the Title I definition of affiliate.

II. THE COMMISSION SHOULD APPLY THE BULK DISCOUNT RATE EXEMPTION TO ALL MDU RESIDENTS AND ALLOW FLEXIBILITY IN BILLING PROCEDURES

Section 301(b)(2) of the 1996 Act amended the pre-existing uniform rate structure requirement to permit bulk discounts offered to multiple dwelling units ("MDUs").⁷ The Commission tentatively concluded in the *NPRM* that the bulk rate exception prohibits a cable operator from offering discounted rates on an individual basis to MDU subscribers.⁸ That conclusion is consistent with the intent of the 1996 Act, which clearly contemplates that the bulk discount would be evenly applied to all subscribers within a specific MDU.

SBC supports the Commission's analysis that discrimination among individual MDU subscribers at a specific location is restricted by the 1996 Act. On the other hand, the Commission should not adopt regulations that would require the

⁷Communications Act of 1934, 47 U.S.C. Section 623(d) as amended.

⁸*NPRM* ¶ 98.

same bulk discount rates to be applied to all MDU locations within a geographic area served by a cable operator.

The Commission additionally seeks comment as to whether the bulk discounts permitted under Section 301(b)(2) may be individually billed to subscribers or, should only be permitted where the discount is deducted from a bulk payment paid by the property owner on behalf of all of its tenants.⁹ SBC submits that bulk discounts should be allowed for either method of billing. Assuming all the subscribers in a specific MDU are billed the same bulk discount rate, it should not matter from the Commission's perspective whether the residents are billed individually by the operator or the property owner/manager. As long as the discount inures to the benefit of all of the residents in a MDU, then the discount truly is "bulk" in nature, and that result is all that is required under the statute.

In the highly-competitive MDU environment, it is essential that the cable operators have sufficient flexibility to determine the appropriate billing method as dictated by market needs. Restrictive MDU regulations will do nothing to help

⁹*Id.*

produce the competitive results clearly intended by Congress in passing the 1996 Act and thus should be avoided by the Commission.

On a separate but related issue, the Commission asks whether principles of federal antitrust law should apply with respect to allegations that a bulk discount for a MDU amounts to predatory pricing.¹⁰ SBC believes that allegations of predation should be made and reviewed under principles of federal antitrust law and that the federal district court is the proper forum for addressing such allegations, not the Commission.

¹⁰NPRM ¶ 100.

CONCLUSION

The Commission's proposals in the *NPRM* generally reflect the provisions of the 1996 Act, but to the extent they do not, the Commission should modify those proposals in accordance with these comments.

Respectfully submitted,

By _____
LIAM S. COONAN
CYNTHIA A. BARTON

ATTORNEYS FOR SOUTHWESTERN
BELL VIDEO SERVICES, INC.
175 E. Houston, Room 1216
San Antonio, Texas 78205

JAMES D. ELLIS
ROBERT M. LYNCH
DAVID F. BROWN

ATTORNEYS FOR
SBC COMMUNICATIONS INC.
175 E. Houston, Room 1254
San Antonio, Texas 78205

June 4, 1996